A

MARINA MOHD YUSOFF

v.

PEKELILING TRIANGLE SDN BHD & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASAN LAH JCA
SULAIMAN DAUD JCA

C [CIVIL APPEAL NOS: W-02-944-2006, W-02-945-2006, W-02-1018-2006 & W-02-1070-2006]
22 OCTOBER 2007

CIVIL PROCEDURE: *Injunction - Interlocutory mandatory injunction*
D *- Principles applicable - Serious questions to be tried - Damages - Balance of convenience - Appointment of receiver and manager, whether valid - Whether granting of Erinford injunction correct - Nugatoriness - Pengurusan Danaharta Nasional Berhad Act 1998, ss. 23, 24, 25A, 60, 72*

E

The following were four related appeals: (i) the first appeal was by one Marina Mohd Yusoff ('MY'), the defendant in the main action and the plaintiff in the counterclaim, against the decision of the learned judge granting one Pekeliling Triangle Sdn Bhd ('PTSB'), the plaintiff in the main action, interlocutory injunctions
F restraining MY from occupying certain lands and a building erected thereon belonging to PTSB, and from interfering with the appointed receiver and manager's control over the assets of PTSB ('first order'); (ii) the second appeal and the fourth appeal were also MY's appeals against the refusal to grant the interlocutory
G injunction sought against the first defendant/first respondent and the fifth to eighth defendants/second to fifth respondents in the counterclaim ('second order'), and the refusal to grant a stay of execution of the first order, respectively; and (iii) the third appeal was by the first defendant in the counterclaim against the grant
H of an Erinford injunction to MY pending the disposal of her appeal against the second order.

I

PTSB was at all material times the registered owner of the lands and the building while MY held 95% of the shares of PTSB. PTSB was granted credit facilities of RM169,800,000 by one Bank Bumiputera Malaysia Bhd ('BBMB'), the payment of which was secured by, among others, a debenture entered into between PTSB and BBMB ('debenture'), a first legal charge over the lands executed by PTSB in favour of BBMB and a tripartite agreement entered into between PTSB, BBMB and another party. PTSB defaulted in its loan repayments and by a vesting certificate issued under the Pengurusan Danaharta Nasional Berhad Act 1998 ('Act'), the loan and security documents related to the facility agreement were vested to one Danaharta Urus Sdn Bhd ('Danaharta Urus'), a subsidiary of one Pengurusan Danaharta Nasional Berhad ('Corporation'). In October and December 2002, Danaharta Urus appointed the second, third and fourth defendants in the counterclaim to be the Special Administrators under the Act. Their appointment was subsequently terminated with effect from 9 December 2005 and on the same day, Danaharta Urus appointed the first defendant in the counterclaim as the receiver and manager under the terms of the debenture. Despite the appointment of the receiver and manager, MY continued to occupy the lands and building, ultimately causing PTSB to file the main suit against MY claiming possession of the lands and building, and seeking injunctions to restrain MY from interfering with the receiver and manager in managing and controlling PTSB's assets. The learned judge found as aforementioned, resulting in the present appeals. For both the first and second appeals, MY advanced the following two principal issues: (a) the appointment of the receiver and manager was invalid in the absence of any proper instrument of appointment; and (b) the interlocutory injunctions applied for amounted to final relief sought under the writ and should not be allowed.

Held (dismissing the first, second and fourth appeals; allowing the third appeal)

Per Sulaiman Daud JCA delivering the judgment of the court:

(1) With regard to the first appeal, having considered PTSB's cause of action against MY and the reliefs sought by PTSB against MY in the main action, it was clear that there were serious questions to be tried, including the right of the receiver and manager to have control and management over

A the said assets and the right to exercise the powers conferred upon them under the debenture. It was the only question that had to be answered at this stage. Having considered, on the facts, MY's defence and cause of action in the counterclaim, it was plain that if the interlocutory B injunction were wrongly granted to PTSB, damages would be an adequate remedy for MY. At the same time, PTSB was in a financial position to pay MY under the undertaking as to damages given by it. In so far as the balance of convenience was concerned, the facts showed that the C justice of the case lay strongly in favour of PTSB. PTSB as the registered proprietor had priority of interest on the lands over MY, who was only a shareholder. With regard to the effect of the interlocutory injunctions, even though the plaintiff would, with the grant thereof, substantially obtain D the reliefs sought under the writ, for the reasons aforesaid, PTSB had shown that it had an unusually clear case and a real prospect of success at the trial to justify the grant of the interlocutory injunctions. For the above reasons, the first appeal ought to be unanimously dismissed. (paras 13, 14, E 15, 16, 18 & 19)

(2) Having perused the deed of appointment of the receiver and manager by Danaharta Urus, this court had no hesitation in accepting the same as the valid instrument of appointment F of the receiver and manager pursuant to the terms of the debenture. The appointment of a Special Administrator under the Act, specifically under ss. 23, 24 and 25A thereof, is only discretionary at the instance of the person specified therein. There is nothing in the Act to prevent the G appointment of any person other than the Special Administrator to have the custody, control and management of the assets of any affected person vested to the Corporation or its subsidiary. In the instant case, Danaharta Urus had acquired the rights and interests of the lending H bank under the debenture, which provided for the appointment of the receiver and manager on the occurrence of any event of default thereunder. For those reasons, the appointment of the receiver and manager was proper. (para 23)

I

(2a) With regard to the second respondent, having perused through the grounds as set out in MY's memorandum of appeal, there was nothing therein that related or made reference to the second respondent. The grounds advanced in paras. 1 to 4 of the memorandum only related to the appointment of the first respondent as the receiver and manager of PTSB, which had been dealt with earlier. The ground stated in para. 5 was general in nature without specifying the points of law or fact that had been wrongly decided concerning the said respondent. On this ground alone, the appeal ought to be dismissed. (para 24)

(2b) In the case of the third to fifth respondents, s. 72 of the Act operated to bar the grant of the interlocutory injunctions sought against them in their capacity as agents of Danaharta Urus. The court is precluded by the express provisions in s. 72 of the Act from granting any injunction or other restraining orders against the Corporation. The said prohibition also applied to a subsidiary of the Corporation by virtue of s. 60 of the Act. Further, in the first appeal, the balance of convenience lay in favour of granting the injunctive reliefs sought by PTSB. Therefore, the second appeal ought to be unanimously dismissed. (paras 25, 26, 28 & 29)

(3) In respect of the third appeal, any application for an Erinford injunction must involve considerations of the overall justice of the case and as to whether damages were an adequate remedy. Since the learned judge had rightly applied s. 72 of the Act in refusing the interlocutory injunction sought by MY, the granting of the Erinford injunction by the learned judge would seem to run foul of s. 72 of the Act as it had the like effect of restraining the action taken or proposed to be taken by Danaharta Urus or its servants over the assets of PTSB. Further, MY's claims against the first respondent was substantially for damages based on the alleged wrongful appointment of the first respondent as the receiver and manager of PTSB. In view of the earlier findings that damages would be an adequate remedy and Danaharta Urus, by whom the receiver and manager was appointed, was in a financial position to pay them, there was no likelihood of MY's appeal being rendered nugatory if the

Erinford injunction were refused. The first respondent, as the receiver and manager, should be given the immediate benefit of the earlier interlocutory injunction obtained by PTSB against MY. It was also clear from the evidence that MY had declined to give possession of the lands and building for the time being occupied by her and her agents. There was no justification to restrain the duly appointed receiver and manager to take over the possession, management and control of the said assets. Any further delay in realizing the assets would only cause hardship to Danaharta Urus in its endeavour to recover the money expended in purchasing the said non-performing loan from BBMB. The third appeal, therefore, ought to be unanimously allowed. (para 32, 33 & 34)

(4) In respect of the fourth appeal, it appeared from the affidavit in support that the application for stay was on the basis that failure to stay the execution of the interlocutory injunction would render the first appeal nugatory. However, this point was not taken up by learned counsel in his submission. Be that as it may, this court had earlier decided, in setting aside the Erinford injunction, that any loss suffered by MY in the alleged wrongful appointment of the receiver and manager could be quantified, and the first respondent, being the receiver and manager appointed by Danaharta Urus, would be in a financial position to pay her. There was, thus, no reason why this appeal would be rendered nugatory if successful. For the reasons aforesaid, the fourth appeal ought to be unanimously dismissed. (para 36 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Keempat-empat rayuan berikut adalah saling berkaitan antara satu sama lain, iaitu: (i) rayuan pertama oleh seorang Marina Mohd Yusoff ('MY'), defendan di dalam tindakan utama dan plaintif di dalam tuntutan balas, terhadap keputusan yang arif hakim kerana memberi injunksi interlokutori kepada Pekeliling Triangle Sdn Bhd ('PTSB'), iaitu plaintif di dalam tindakan utama, menegah MY dari menduduki tanah tertentu dan bangunan milik PTSB yang didirikan di atasnya ataupun mengganggu penerima dan pengurus dari mengawal aset-aset PTSB ('perintah pertama'); (ii) rayuan kedua dan keempat adalah juga rayuan-rayuan oleh MY terhadap keengganan mahkamah mengeluarkan injunksi interlokutori terhadap

defendan pertama/responden pertama serta defendan-defendan kelima hingga kelapan/responden-responden kedua hingga kelima di dalam tuntutan balas ('perintah kedua'), dan membenarkan penangguhan pelaksanaan perintah pertama, masing-masingnya; dan (iii) rayuan ketiga adalah oleh defendan pertama di dalam tuntutan balas terhadap pemberian injunksi Erinford kepada MY sementara menunggu pelupusan rayuan beliau terhadap perintah kedua.

PTSB pada semua masa material adalah pemilik berdaftar tanah dan bangunan sementara MY memegang 95% saham-saham PTSB. PTSB telah diberi kemudahan kredit sebanyak RM169,800,000 oleh Bank Bumiputera Malaysia Bhd ('BBMB'), di mana bayaran baliknya dijamin antara lain oleh satu debentur yang dimeterai di antara PTSB dan BBMB ('debentur'), satu gadaian pertama terhadap tanah yang dimeterai oleh PTSB untuk manfaat BBMB dan satu perjanjian tigapihak yang dimeterai di antara PTSB, BBMB dan satu pihak lain. PTSB gagal membayar balik pinjaman dan melalui satu sijil letakhak yang dikeluarkan di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta'), pinjaman dan dokumen-dokumen jaminan berkaitan dengan perjanjian fasiliti telah diletakhak kepada Danaharta Urus Sdn Bhd ('Danaharta Urus'), anak syarikat Pengurusan Danaharta Nasional Berhad ('Perbadanan'). Pada bulan Oktober and Disember 2002, Danaharta Urus melantik defendan kedua, ketiga dan keempat di dalam tuntutan balas sebagai Pentadbir Khas di bawah Akta. Namun, perlantikan mereka kemudiannya ditamatkan berkuatkuasa dari 9 Disember 2005, dan pada hari yang sama, Danaharta Urus melantik defendan pertama di dalam tuntutan balas sebagai penerima dan pengurus di bawah terma-terma debentur. Walaupun penerima dan pengurus telah dilantik, MY masih terus menduduki tanah dan bangunan, sekaligus memaksa PTSB untuk memfail tindakan terhadap MY menuntut milikan tanah dan bangunan, serta injunksi bagi mencegah MY dari mengganggui penerima dan pengurus dalam mengurus dan mengawalselia aset-aset PTSB. Yang arif hakim mendapati seperti di atas, dan akibatnya adalah rayuan-rayuan di sini. Bagi rayuan-rayuan pertama dan kedua, MY mengemukakan dua isu utama seperti berikut: (a) perlantikan penerima dan pengurus tak sah disebabkan ketiadaan instrumen perlantikan yang teratur; dan (b) injunksi-injunksi interlokutori yang dipohon adalah sebenarnya permohonan untuk relif-relif muktamad di bawah writ dan tidak harus dibenarkan.

Diputuskan (menolak rayuan-rayuan pertama, kedua dan keempat; membenarkan rayuan ketiga)
Oleh Sulaiman Daud HMR menyampaikan penghakiman mahkamah:

(1) Berhubung rayuan pertama, dengan mengambilkira kausa tindakan PTSB terhadap MY serta relif-relif yang dipohon PTSB terhadap MY di dalam tindakan utama, adalah jelas bahawa terdapat isu-isu serius yang perlu dibicarakan, termasuk hak penerima dan pengurus untuk mendapat kawalan dan pengurusan ke atas aset-aset tersebut dan hak untuk melaksanakan kuasa-kuasa yang diberikan kepada mereka di bawah debentur. Inilah soalan tunggal yang perlu dijawab di peringkat ini. Berdasarkan fakta, serta pembelaan dan kausa tindakan MY di dalam tuntutan balas, adalah jelas bahawa jika injunksi interlokutori diberi kepada PTSB secara salah, gantirugi adalah remedi yang memadai untuk MY. Pada masa yang sama, PTSB mempunyai keupayaan kewangan untuk membayar MY di bawah akujanji gantirugi yang diberikan olehnya. Berhubung dengan imbangan keselesaan, fakta menunjukkan bahawa keadilan kes jelas berada di pihak PTSB. PTSB selaku pemilik berdaftar mempunyai kepentingan utama terhadap tanah mengatasi MY, yang hanya seorang pemegang saham. Berkaitan kesan injunksi interlokutori, walaupun plaintif, dengan injunksi tersebut, memperoleh secara substantial relif-relif yang dipohon di bawah writ, PTSB, atas alasan-alasan di atas, telah menunjukkan bahawa ia mempunyai kes yang amat jelas dan prospek sebenar untuk berjaya di perbicaraan bagi menjustifikasikan pemberian injunksi-injunksi interlokutori berkenaan. Atas alasan-alasan ini, rayuan pertama harus ditolak dengan sebulat suara.

(2) Meneliti suratikatan perlantikan penerima dan pengurus oleh Danaharta Urus, mahkamah tidak teragak-agak untuk menerima dokumen tersebut sebagai instrumen perlantikan penerima dan pengurus yang sah di bawah terma-terma debentur. Perlantikan Pentadbir Khas di bawah Akta, khususnya di bawah ss. 23, 24 dan 25A Akta, hanyalah bersifat budibicara menurut kehendak orang yang dinamakan di situ. Tiada suatupun di dalam Akta yang menghalang perlantikan seseorang selain dari Pentadbir Khas untuk mengambil jagaan, kawalan dan pengurusan aset-aset sesiapa

sahaja yang telah diletakhak kepada Perbadanan atau subsidiarinya. Dalam kes semasa, Danaharta Urus telah mendapat hak-hak dan kepentingan bank peminjam di bawah debentur, yang membenarkan perlantikan penerima dan pengurus bilamana berlaku kemungkiran di bawahnya. Atas alasan-alasan ini, perlantikan penerima dan pengurus adalah teratur.

(2a) Berhubung dengan responden kedua, setelah meneliti alasan-alasan seperti yang dibentangkan di dalam memorandum rayuan MY, tiada apapun di situ yang mengaitkan atau yang merujuk kepada responden kedua. Alasan-alasan yang dikemukakan di perenggan 1 hingga 4 memorandum hanya berkait dengan perlantikan responden pertama sebagai penerima dan pengurus PTSB, yang sudah pun ditangani sebelum ini. Alasan yang terkandung di dalam perenggan 5 adalah bersifat umum dan tidak menamakan dengan khusus persoalan undang-undang atau fakta yang dikatakan diputuskan secara salah mengenai responden tersebut. Atas alasan ini sahaja, rayuan sudah harus ditolak.

(2b) Berhubung dengan responden-responden ketiga hingga kelima, s. 72 Akta beroperasi menghalang pemberian injunksi interlokutori yang dipohon terhadap mereka dalam kapasiti mereka sebagai ejen-ejen Danaharta Urus. Seksyen 72 Akta dengan secara expres menegah mahkamah dari memberikan apa jua injunksi atau perintah tegahan terhadap Perbadanan. Berdasarkan s. 60 Akta, tegahan tersebut juga terpakai kepada mana-mana subsidiari Perbadanan. Selain itu, di dalam rayuan pertama, imbangan keselesaan memihak kepada pemberian relif injunktif yang dipohon oleh PTSB. Oleh itu, rayuan kedua harus ditolak dengan sebulat suara.

(3) Mengenai rayuan ketiga, mana-mana permohonan untuk injunksi Erinford semestinya melibatkan pertimbangan keadilan kes secara keseluruhan dan sama ada gantirugi merupakan remedi yang memadai. Oleh kerana yang arif hakim telah menggunakan s. 72 Akta dengan betulnya apabila beliau menolak injunksi interlokutori yang dipohon MY, pemberian injunksi Erinford oleh yang arif hakim ternampak sebagai melanggari s. 72 Akta disebabkan kesannya adalah bahawa ia menghalang apa-apa tindakan atau cadangan tindakan yang hendak diambil oleh Danaharta Urus atau ejen-ejennya

terhadap aset-aset PTSB. Lagipun, tuntutan MY terhadap responden pertama adalah secara pentingnya untuk gantirugi yang didasarkan kepada dakwaan perlantikan salah responden pertama sebagai penerima dan pengurus PTSB. Mengambilkira dapatan-dapatan terdahulu bahawa gantirugi adalah remedi yang memadai dan Danaharta Urus, yang melantik penerima dan pengurus, mempunyai kemampuan kewangan untuk membayar mereka, tiada kemungkinan bahawa rayuan MY akan menjadi sia-sia jika injunksi Erinford ditolak. Responden pertama, selaku penerima dan pengurus, harus diberikan manfaat segera injunksi interlokutori terdahulu yang diperolehi oleh PTSB terhadap MY. Adalah juga jelas dari keterangan bahawa MY telah enggan menyerahkan milikan tanah dan bangunan yang kini diduduki oleh beliau dan ejen-ejen beliau. Tiada justifikasi untuk menghalang penerima dan pengurus untuk mengambilalih milikan, pengurusan dan kawalan aset-aset berkenaan. Sebarang kelewatan selanjutnya dalam mengambilalih aset-aset akan hanya menyusahkan Danaharta Urus dalam usahanya untuk mendapatkan kembali wang yang telah dibelanjakan bagi membeli pinjaman terbengkalai dari BBMB. Rayuan ketiga, dengan itu, harus dibenarkan dengan sebulat suara.

(4) Berkaitan rayuan keempat, afidavit sokongan nampaknya menunjukan bahawa permohonan untuk penangguhan dibuat atas dasar bahawa kegagalan menangguhkan pelaksanaan injunksi interlokutori akan menyebabkan rayuan pertama menjadi sia-sia. Bagaimanapun, persoalan ini tidak dibangkitkan oleh peguam terpelajar semasa hujahnya. Apapun, mahkamah ini telah pun memutuskan sebelum ini, semasa mengenepikan injunksi Erinford, bahawa sebarang kerugian yang ditanggung oleh MY ekoran perlantikan salah penerima dan pengurus tersebut boleh dijumlahkan, dan responden pertama, selaku penerima dan pengurus yang dilantik oleh Danaharta Urus, mempunyai kemampuan kewangan untuk membayar MY. Oleh itu, tiada sebab mengapa rayuan ini akan menjadi sia-sia jika ianya berjaya. Atas alasan-alasan ini, rayuan keempat harus ditolak dengan sebulat suara.

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Erinford Properties Ltd v. Cheshire County Counsel [1974] 2 All ER 448 ***(refd)***

Foss v. Harbottle [1843] 67 ER 189 ***(refd)***

Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor [2002] 7 CLJ 175 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Locabail International Finance Ltd. v. Agroexport [1986] 1 All ER 901 ***(refd)***

MBf Holdings Berhad v. East Asiatic Company (Malaysia) Berhad [1995] 4 CLJ 73 HC ***(refd)***

Pengurusan Danaharta Nasional Berhad v. Tang Kwor Ham & Ors And Another Appeal [2007] 4 CLJ 513 FC ***(refd)***

Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Berhad & Ors [2002] 2 CLJ 758 HC ***(refd)***

Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 186(1)

Pengurusan Danaharta Nasional Berhad Act 1998, ss. 14, 23, 24, 25A, 60, 72

(Civil Appeal No: W-02-944-2006)

For the appellant - Zainur Zakaria (David Mathews with him); M/s Zainur Zakaria & Co

For the respondent - Yoong Sin Min (Lau Kee Sern with her); M/s Shook Lin & Bok

(Civil Appeal No: W-02-945-2006)

For the appellant - Zainur Zakaria (David Mathews with him); M/s Zainur Zakaria & Co

For the 1st respondent - Yoong Sin Min (Lau Kee Sern with her); M/s Shook Lin & Bok

For the 2nd respondent - Cindy Goh Joo Seong; M/s Cheang & Ariff

For the 3rd, 4th & 5th respondents - Ezane Chong; M/s Skrine

(Civil Appeal No: W-02-1018-2006)

For the appellant - Yoong Sin Min (Lau Kee Sern with her); M/s Shook Lin & Bok

For the respondent - Zainur Zakaria (David Mathews with him); M/s Zainur Zakaria & Co

A *(Civil Appeal No: W-02-1070-2006)*

For the appellant - Zainur Zakaria (David Mathews with him); M/s Zainur Zakaria & Co

For the respondent - Yoong Sin Min (Lau Kee Sern with her); M/s Shook Lin & Bok

B *[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-353-2006]*

Reported by Suresh Nathan

JUDGMENT

C

Sulaiman Daud JCA:

[1] There were four related appeals before us as follows:

(a) the first appeal (No. W-02-944-2006) is by Marina bte Mohd
D Yusoff ("MY"), the defendant in the main action and plaintiff in the counterclaim, against the decision of the learned judge whereby he granted Pekeliling Triangle Sdn Bhd ("PTSB"), the plaintiff in the main action, interlocutory injunctions restraining MY from occupying certain lands and building
E belonging to PTSB, and from interfering with the appointed receiver and manager's control and management over the assets of PTSB ("the first order");

(b) the second appeal (No. W-02-945-2006) and the fourth
F appeal (No. W-02-1070-2006) are also MY's appeal against the refusal to grant the interlocutory injunction sought against the first and the fifth to the eight defendants in the counterclaim ("the second order"); and the refusal to grant stay of execution of the first order respectively.

G (c) The third appeal (No. W-02-1018-2006) is by the first defendant in the counterclaim against the grant of the Erinford injunction to MY pending the disposal of her appeal against the second order.

H **[2]** After hearing submissions of counsels from both parties, we dismissed the first, second and fourth appeals, but allowed the third appeal. We now give our reasons for the decision.

Background

I

[3] PTSB is at all material times the registered owner of three pieces of land respectively held under C.T. 16910 Lot No. 151, C.T. 16911 Lot 152 and C.T. 16916 Lot No 157, all of section

87A, Town of Kuala Lumpur ("the said lands") together with the building erected thereon ("the said building"). MY is the holder of 95% shares of PTSB. Pursuant to a facility agreement dated 15 March 1995 PTSB was granted credit facilities of RM169,800,000 by Bank Bumiputra Malaysia Berhad ("BBMB"), the payment of which was secured by, among others, (i) a debenture dated 15 March 1995 entered between PTSB and BBMB ("the debenture"); (ii) a first legal charge over the said lands executed by PTSB in favour of BBMB; and (iii) a tripartite agreement dated 15 March 1995 ("the tripartite agreement") entered between PTSB, BBMB and one ERF Sdn Bhd.

[4] PTSB defaulted in its loan repayments. By a vesting certificate dated 26 April 2001 issued under the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act"), the loan and security documents related to the facility agreement were vested as of 1 March 2002 to Danaharta Urus Sdn Bhd ("Danaharta Urus"), a subsidiary of Pengurusan Danaharta Nasional Berhad ("the Corporation"). In October and December 2002, Danaharta Urus appointed one Lim Tian Huat, Chew Cheng Leong and Raja Ali bin Raja Othman, the second, third and fourth defendants in the counterclaim respectively, to be the Special Administrators of PTSB under the Act. Their appointment were subsequently terminated with effect from 9 December 2005. On the same day Danaharta Urus appointed one Duar Tuan Kiat, the first defendant in the counterclaim, as the receiver and manager of PTSB under the terms of the debenture. Clause 8(2)(i) of the debenture conferred the receiver and manager the power to take possession of and get in all or any of the assets of PTSB for the purposes specified therein.

[5] Despite the appointment of the receiver and manager, MY continue to occupy the said lands and building. Subsequently by a letter dated 1 March 2006, PTSB through its solicitors, demanded MY to vacate the said lands and building but there was no response. On 21 April 2006 PTSB filed the main suit herein against MY claiming possession of the said lands and building, and seeking injunctions to restrain MY from interfering with the receiver and manager in managing and controlling PTSB's asset.

[6] MY in her defence averred that PTSB has entered into a sale and purchase agreement with one Marina Sdn Bhd ("MSB") thereby making the latter the beneficial owner of the lands and building. She also denied that PTSB had defaulted in the payment of the loan for the same to be categorized as a non-performing loan. MY also alleged that the appointment of the receiver and manager of PTSB is void in law and that PTSB or its servants, agents or nominees are not entitled to enter the said lands and building. MY also incorporated in her defence a counterclaim whereby she seeks a declaration that the appointment of the said receiver and manager was void and of no effect and the consequential injunctive reliefs to restrain the receiver and manager from interfering with MY's right to enter and occupy the said lands and building.

[7] Pursuant to the main suit PTSB had applied for and obtained the interlocutory injunction to which the first appeal relates. The learned high court judge however refused to grant the interlocutory injunction sought by MY pursuant to the counterclaim.

[8] We have dealt with and considered both the first and second appeals together as they are based on the same factual matrix and substantially identical issues. Encik Zainur Zakaria, for the appellant, advanced two principal issues for both the first and second appeals. First he submitted that the appointment of the receiver and manager is invalid in the absence of any proper instrument of appointment, and secondly it is submitted that the interlocutory injunction applied for amounts to final relief sought under the writ and should not be allowed.

Interlocutory Injunction Principle, In Brief

[9] Learned counsel for both parties have correctly set out the correct approach to be adopted by the court in an application for an interlocutory injunction. The threshold test to be applied in such an application was established in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396. The court must first be satisfied that a claim is not frivolous or vexatious in that there is a serious question to be tried. If such exists, the court should next consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by award of damages if the interlocutory injunction

is refused. If answered in the negative, the court should then consider whether the defendant can be adequately compensated by award of damages if the interlocutory injunction was wrongly granted. If there was a doubt as to the adequacy of damages as a remedy, then the question of balance of convenience has to be considered.

[10] In the instant case the remedy which PTSB seeks against MY includes delivery of possession of the said lands and building which in substance is a mandatory interlocutory injunction. Such injunctions are granted on the same basic principles as are prohibitory injunctions, namely there is a question to be tried and the balance of convenience. However in addition the plaintiff, in order to succeed, has to show that his case has a higher probability of success at the trial of the action. This test was adopted in *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566 following the English Court of Appeal case of *Locabail International Finance Ltd. v. Agroexport* [1986] 1 All ER 901 (see also *MBf Holdings Berhad v. East Asiatic Company (Malaysia) Berhad* [1995] 4 CLJ 73). The rationale given for this different approach is that in the case of a mandatory interlocutory injunction the plaintiff will in substance obtain the reliefs that he seeks in the main action.

[11] With these guiding principles we now turn to consider the present appeals.

W-02-944-06

[12] With regard to the first appeal, the first factor on whether there is a serious question to be tried can be answered without any difficulty. The present suit by PTSB against MY is for trespassing and interfering with the right and control over its own property. It is pertinent to note the action was initiated by the receiver and manager appointed by Danaharta Urus pursuant to the terms of a debenture upon PTSB's default under the facility agreement secured, *inter alia*, by the debenture. Danaharta Urus has acquired the rights, titles and interests in the facility agreement and the debenture by virtue of a vesting order under s. 14 of the Act. In the appeal MY admitted being in occupation of the said lands and building but however disputed the validity of the appointment of the receiver and manager to have the control and management thereof.

[13] Having considered PTSB's cause of action against MY and the reliefs sought by PTSB against MY in the main action, we are more than satisfied that there are serious questions to be tried, including the right of the receiver and manager to have the control and management over the said assets and the right to exercise the powers conferred upon them under the debenture. It is the only question that has to be answered at this stage. As has been stated time and again it is not part of the court's function at this stage of the proceedings either to form a view on the merits of the plaintiff's case or to decide on difficult questions of law which necessitate detailed deliberation and consideration.

[14] Having found that there is a serious question to be tried, the court must next consider the balance of convenience or the justice of the case, including whether MY can be adequately compensated by damages if the interlocutory injunction was wrongly granted to PTSB. It is not disputed that the said lands and building are subject to a charge in favour of Danaharta Urus which has purchased the non-performing loan. MY did not deny that her agents and servants are in continuous occupation of the said lands and building. In her affidavit in reply (No 1) she claimed that she was authorized to occupy the said lands and building in order to keep the building in good repair and to complete its construction. It is also alleged that the appointment of the receiver and manager is void in law, and that the receiver and manager or his agents and servants are not entitled to enter the said lands and building. It is to be noted that these two factors also formed the basis of MY's cause of action in the counterclaim wherein she only prays for general damages in addition to the ancillary declaratory and injunctive reliefs. Having considered MY defence and cause of action in the counterclaim, it is plain to us that damages would be an adequate remedy for MY if the interlocutory injunction is wrongly granted to PTSB.

[15] At the same time we are also of the view that PTSB is in a financial position to pay MY under the undertaking as to damages given by it. The said lands and building formed the assets of PTSB. The appointment of the receiver and manager will facilitate the sale of the assets which would maximize the returns to satisfy its creditors, including Danaharta Urus. These assets or the proceeds of sale thereof, as the case may be, will definitely provide the financial means for PTSB, through Danaharta Urus, to fulfill

its undertaking as to damages to MY if the latter were to succeed at the trial in establishing her right to occupy or otherwise deal with the said lands and building.

[16] In so far as the balance of convenience is concerned, we are also of the view that the justice of the case lies strongly in favour of PTSB. PTSB as the registered proprietor has priority of interest on the said lands over MY who is only a shareholder. The said lands however is not free from encumbrances but subject to a charge as a security for the facility agreement. With the acquisition of the facility agreement and other rights and interests relating thereto, Danaharta Urus had in fact purchased the rights and interests over the non-performing loan from BBMB. The sole purpose of the injunction sought by PTSB, through its receiver and manager, is for the preservation of the assets and to facilitate the sale thereof. The continued occupation of the said lands and building by MY will also prevent any prospective buyer from inspecting the said property with the resulting effect of hindering the sale. Any delay in realizing such assets will undoubtedly lead to further accumulation of the interests payable by PTSB for the remaining unpaid sum under the facility agreement. At the same time Danaharta Urus would be unable to recover the sum expended for the purchase of the non-performing loan which will ultimately affect its financial capabilities to meet the object of its incorporation under the Act.

[17] On the other hand MY, as shareholder, has no legal right to any item of property owned by PTSB other than to a share in the profits while the company continue to carry out business. She has no power to deal with the said lands and building. MY is also fully aware of PTSB's default under the facility agreement and that the rights and interests of the lending bank have been vested to Danaharta Urus who appointed the receiver and manager.

[18] With regard to the effect of the interlocutory injunction, even though we agree that the plaintiff will, with the grant thereof, substantially obtain the reliefs sought under the writ but we are satisfied for the reasons aforesaid that PTSB has shown that they have an unusually clear case and a real prospect of success at the trial to justify the grant of the interlocutory injunctions.

[19] For the above reasons, we unanimously dismissed the first appeal with costs. We also made an order for the deposit to be paid to the respondent towards the account of taxed costs.

W-02-945-06

[20] We next turn to the second appeal against the decision of the learned judge whereby he refused to grant the interlocutory injunctions sought by MY, as plaintiff in the counterclaim, against the first and the fifth to the eight defendants therein to restrain them from obstructing or interfering with her alleged right to enter, remain or otherwise occupy the said lands and building. Central to MY's case as argued by learned counsel is that the receiver and manager was not validly appointed to exercise the power under the said debenture.

[21] With regard to this issue, En Zainur Zakaria, for the appellant, pointed out exhs. PTSB5 (at pp 665-666 of the appeal record) is not the proper instrument of appointment of the receiver and manager but merely a notification of such appointment that has to be lodged with the Registrar of Companies under s. 186(1) of the Companies Act. Further it is also submitted that the said appointment could not have been made under the Act by the Special Administrators of PTSB as their appointment have been earlier terminated prior to the appointment of the receiver and manager. According to learned counsel under the Act only the Special Administrator is empowered to appoint a receiver and manager in respect of any assets vested to the Corporation.

[22] Miss Yoong Sin Min, for the first respondent, on the other hand clarified that the appointment of the receiver and manager was not made under the Act but pursuant to the terms of the debenture upon PTSB's default under the facility agreement to which the debenture relates. She drew the court's attention to PTSB20 (at p 739 of the appeal record) which exhibited the deed of appointment of the receiver and manager by Danaharta Urus.

[23] Having perused through the said deed we have no hesitation to accept the same as the valid instrument of appointment of the receiver and manager pursuant to the terms of the debenture. We are of the view that the appointment of a Special Administrator under the Act, specifically under ss. 23, 24 and 25A thereof, is

only discretionary at the instance of the person specified therein. There is nothing in the Act to prevent the appointment of any person other than the Special Administrator to have the custody, control and management of the asset of any affected person vested to the Corporation or its subsidiary. In the instant case Danaharta Urus has acquired the rights and interests of the lending bank under the debenture which provide for the appointment of the receiver and manager on the occurrence of any event of default thereunder. For these reasons we are of the view that the appointment of the receiver and manager was proper.

[24] Next we turn to consider the appeal against the second to the fifth respondents, being the fifth to the eight defendants in the counterclaim respectively. With regard to the second respondent, its learned counsel Miss Cindy Goh submitted that MY grounds of appeal as set out in the memorandum of appeal herein do not relate to the second defendant and therefore irrelevant for consideration against her client. We fully agree with her. Having perused through the grounds as set out in the memorandum of appeal we see nothing therein that relate or make reference to the second respondent. As can be seen the grounds advanced in paras. 1 to 4 of the memorandum only relate to the appointment of the first respondent as the receiver and manager of PTSB which has been dealt with aforesaid. The ground stated in para. 5 is general in nature without specifying the points of law or fact which has been wrongly decided concerning the said respondent. We dismissed the appeal against the second respondent on this ground alone.

[25] In the case of the third to the fifth respondents, learned counsel Miss Ezane Chong submitted that the issues forming the basis of MY's appeal only relate to the alleged acts or omissions of Danaharta Urus. She pointed out that the fourth respondent Prokhas Sdn Bhd is merely a company assigned with the management of Danaharta Urus, while the third and the fifth respondents were no longer in the employment of Danaharta Urus to have any capacity or right to restrain the receiver and manager in the manner sought in the interlocutory injunction. In any event it is further submitted that if the interlocutory injunctions are sought against the third to the fifth respondents in their capacity as agents of Danaharta Urus then s. 72 of the Act shall operate

to bar the grant of the said injunctive relief. To recapitulate it is on this ground that the learned judge dismissed MY's application where, in his brief ruling, he said:

> The defendant by encl. 13 is in effect attempting to obtain indirectly an injunction against Danaharta. By stopping the Receiver and Manager from obtaining possession of the said building the defendant would have restrained Danaharta from its right to realize the charge over the land and building. Under section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) no injunctions order can be made against Danaharta or to affect its action. ...

[26] We fully agree with the learned judge. In *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513, the Federal Court adopted with approval the decision in *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 and *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor* [2002] 7 CLJ 175, which held that the court is precluded by the expressed provisions in the said s. 72 from granting any injunction or other restraining orders against the Corporation. Here we would add that the said prohibition also apply to a subsidiary of the Corporation by virtue of s. 60 of the Act.

[27] In addition, the respondents also raised the issue of *locus standi*. Learned counsel pointed out the counterclaim revolves solely around the affairs of PTSB and that the alleged losses also relate to PTSB and not MY personally. By reason thereof it is submitted that MY has no *locus standi* to claim for PTSB in her own name. The normal rule is that no shareholder has any right to any property owned by a company. The rule in *Foss v. Harbottle* [1843] 67 ER 189, is that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is the company itself. However this rule is subject to several exceptions as laid down by case laws. However it is not incumbent on our part in an appeal of this nature to form any view on the issue of *locus standi* as it calls for detailed argument on the question of facts and law.

[28] Further, we would reiterate that we have in the first appeal held that the balance of convenience lies in favour of granting the injunctive reliefs sought by PTSB. In consequence thereof the second appeal was also dismissed on this additional ground.

[29] We unanimously dismissed the second appeal with costs. The deposit to be paid to the respondent towards the account of taxed costs.

W-02-1018-2006 And W-02-1070-2006

[30] MY filed a notice of appeal against the decision of the learned judge in respect of the first and second orders, and applied by way of summons in chambers firstly, for stay of execution of the first order and secondly for an Erinford injunction pending her appeal against the refusal to grant the interlocutory injunction to which the second order relates. The learned judge dismissed MY's application for stay but allowed her application for the Erinford injunction. The third appeal, ie, W-02-1018-2006 is by the appointed receiver and manager Duar Tuan Kiat, the first defendant in the counterclaim, against the grant of the Erinford injunction, and the fourth appeal, ie, in W-02-1070-2006 is by MY against the refusal to grant stay.

[31] We will first consider the third appeal. It is well settled that the court has jurisdiction on dismissal of an application for an interlocutory injunction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. The principle governing the grant of the said injunction, known as an Erinford injunction, was set out by Meggary J, in *Erinford Properties Ltd v. Cheshire County Counsel* [1974] 2 All ER 448, at p 454, as follows:

> … There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v. Church (No 2)* [1879-1980] 12 Ch D 454, where speaking of an appeal from the Court of Appeal to the House of Lords, he said at p 458, … when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.' That was the principle which Pennycuick J applied in the *Onion* case [1962] 1 WLR 1085 and although the case had not been cited to me, it was on that principle, and not because I felt any doubts about my judgment on the motion, that I granted Mr Newsom the limited injunction pending appeal that he sought. This is not a case which damages seem to me to be a suitable alternative.

[32] Apart from the test whether there is a likelihood of a successful appeal being rendered nugatory, in our view the principle governing the grant of an interlocutory injunction are equally applicable to the grant of an Erinford injunction. Any application for an Erinford injunction must involve considerations of the overall justice of the case and as to whether damages being an adequate remedy. We have earlier held that the learned judge has rightly applied s. 72 of the Act in refusing the interlocutory injunction sought by MY. In our view the grant of the Erinford injunction by the learned judge would seem to run foul of the said s. 72 as it has the like effect of restraining the action taken or proposed to be taken by Danaharta Urus or its servants or agents over the assets of PTSB.

[33] Further MY's claims against the first respondent is substantially for damages based on the alleged wrongful appointment of the first respondent as the receiver and manager of PTSB. In view of our earlier finding that damages would be adequate remedy and Danaharta Urus by whom the receiver and manager was appointed is in a financial position to pay them, we find no likelihood of MY's appeal being rendered nugatory if the Erinford injunction is refused. The first respondent as the receiver and manager should be given immediate benefit of the earlier interlocutory injunction obtained by PTSB against MY. It is also clear from the evidence that MY has declined to give possession of the lands and building for the time being occupied by her and her agents. We see no justification to restrain the duly appointed receiver and manager to take over the possession, management and control of the said assets. Any further delay in realizing the assets will only cause hardship to Danaharta Urus in its endeavour to recover the money expended in purchasing the said non-performing loan from BBMB.

[34] We therefore unanimously allowed the third appeal with costs. The order of the learned judge as per para. (b) thereof is set aside and the deposit to be refunded to the appellant Duar Tuan Kiat.

W-02-1070-2006

[35] This is MY's appeal from the decision of the learned judge refusing a stay of execution of the first order. The basic principle for the grant of stay is well settled. In *Kosma Palm Oil Mill Sdn*

Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 it was held that to enable the court to grant stay of execution the applicant has to establish the existence of special circumstances.

[36] In the present appeal it appears to us from the affidavit in support that the application for stay is on the basis that failure to stay the execution of the interlocutory injunction would render the first appeal nugatory. However this point was not taken up by learned counsel in his submission. Be that as it may, we have earlier decided, in setting aside the Erinford injunction, that any loss suffered by MY, in the alleged wrongful appointment of the receiver and manager can be quantified, and the first respondent, being the receiver and manager appointed by Danaharta Urus, would be in a financial position to pay her. We therefore see no reason why this appeal would if successful be rendered nugatory.

[37] For the reasons aforesaid we unanimously dismissed this fourth appeal with costs and make further order for the deposit to be paid to the respondent towards the account of taxed costs.